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No. 74-1393

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

THOMAS E. SINGLETON,
Petitioner,

vs.

GEORGE J. L. WULFF, JR., M.D.,
and
MICHAEL FREIMAN, M.D.,
Respondents.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE PETITIONER

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OPINION BELOW

The opinion of the Court of Appeals (App. pp. 65-73), is reported at 508 F.2d 1211 (8th Cir. 1974). The opinion of the District Court (App. pp. 40-58), is reported at 380 F.Supp. 1137 (E.D.Mo. 1974).

JURISDICTION

The judgement of the Court of Appeals was entered on December 31, 1974 (App. p. 64). A timely petition for rehearing, requested by the respondents, was denied on January 9, 1975 (App. pp. 74-80). On March 26, 1975, by order of Mr. Justice Blackmun, the time within which to file a petition for a writ of certiorari was extended to May 8, 1975 (App. p. 88). The petition was filed May 6, 1975, as was granted June 23, 1975 (App. pp 89-90). The jurisdiction of this Court rests on Title 28, U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Whether there is a logical nexus between the status of respondent-physicians and the claims they seek to have adjudicated, and whether respondent-physicians are within the zone of interests to be protected by the constitutional guarantees they seek to invoke, sufficient to confer standing on them to challenge the constitutionality of Section 208.152(12), RSMo Supp. 1973.

2. Whether the Court of Appeals acted in excess of its jurisdiction when it proceeded to determine on the merits the constitutionality of Section 208.152(12), RSMo Supp. 1973.

STATUTES INVOLVED

Section 208.152(12), RSMo Supp. 1973:

> "Benefit payments for medical assistance may be made on behalf of those eligible needy persons who are unable to provide for it in whole or in part, with any payments to be made on the basis of the reasonable cost of the care or reasonable charge for the services as defined and determined by the division of welfare unless otherwise hereinafter provided, for the following:
>
> • • •
>
> (12) Family planning services as defined by federal rules and regulations; provided, however, that such family planning services shall not include abortions unless such abortions are medically indicated."

Title 28, U.S.C. Section 1291:

> "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. . . ."

Title 28, U.S.C. Section 2281:

> "An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title. . . ."

STATEMENT OF THE CASE

On November 2, 1973, respondent-physicians filed a three-count Complaint against petitioner Singleton, then designated as Chief of Bureau of Medical Services, Division of Welfare, Missouri State Department of Public Health and Welfare, and the State Board of Registration for the Healing Arts. Only Count II pertained to petitioner Singleton. In Count II, respondent-physicians challenged the validity, under the United States Constitution, of Section 208.152(12), RSMo Supp. 1973. That statutory section excluded non-medically indicated abortions from the range of medical assistance benefit payments, for family planning services, available to eligible needy persons. The complaint requested that the statutory section be declared in violation of the United States Constitution and that the enforcemen thereof be permanently enjoined. Respondents' Complaint requested the convention of a statutory three-judge court. (App. pp. 14-17).

On December 12, 1973, respondent-physicians propounded four (4) interrogatories to petitioner Singleton (App. pp. 22-23), which were answered on January 15, 1974 (except Interrogatory No. 4, to which objection was made). (App. pp. 26-28).

Petitioner Singleton filed his Motion to Dismiss Council II on December 17, 1973, stating four reasons why the complaint should be dismissed, including the following:

> "2. That the plaintiff doctors do not possess the required standing to litigate the constitutional issues raised."

(App. pp. 24-25).

Attached to respondent-physicians' Memorandum In Opposition to Appellee Singleton's Motion to Dismiss, filed

on February 19, 1974, are affidavits from each of the respondent-physicians. (App. pp. 29-32, 33-36).

A statutory three-judge court of the United States District Court for the Eastern District of Missouri entered its Order and Judgment supported by a Memorandum on May 31, 1974, dismissing the entire Complaint, and specifically dismissing Count II of the Complaint on the grounds that respondents lacked standing to challenge Section 208.152 (12). (App. pp. 46-52).

Respondent-physicians duly filed their notice of appeal to the United States Court of Appeals for the Eighth Circuit on June 28, 1974 (App. p. 63).

The United States Court of Appeals for the Eighth Circuit issued its Judgment, and Memorandum in support thereof, reversing the decision of the District Court on December 31, 1974. The Court of Appeals found it had appellate jurisdiction over the appeal; that the respondent-physicians had standing to adjudicate the constitutionality of the state statute in question; that the Court of Appeals had jurisdiction, for the first time on appeal, to reach the merits of the constitutionality of the state statute in question; and that the state statute was facially unconstitutional (App. pp. 65-73).

The respondent-physicians filed a motion for rehearing, asking for clarification and an award of attorneys' fees, on January 6, 1975. (App. pp. 74-80). The Court of Appeals denied the Motion for Rehearing on January 9, 1975. (App. pp. 81-82).

Petitioner's Motion for Stay of Mandate (App. pp. 83-86), was denied by the Court of Appeals on January 31, 1975 (App. p. 87).

Mr. Justice Blackmun granted petitioner an extension

of time to file his petition for writ of certiorari to and including May 8, 1975, on March 26, 1975. (App. p. 88).

The petition for writ of certiorari was docketed in the United States Supreme Court on May 6, 1975, and the petition was granted on June 23, 1975. (App. pp. 89-90).

SUMMARY OF ARGUMENT

1. Respondents, claiming status as licensed physicians desiring to perform abortions on women qualifying as needy persons eligible for state Medicaid assistance, are without standing to adjudicate the constitutionality of a state statute excluding abortions, unless medically indicated, from family planning services reimbursable by Medicaid assistance. This Court, in numerous cases, has promulgated a number of yardsticks by which to measure the existence of standing. These yardsticks, or tests, have become increasingly exclusive during the last decade and a half. Proceeding from *Baker* v. *Carr*, 369 U.S. 186 (1962), through *Flast* v. *Cohen*, 392 U.S. 83 (1968), *Association of Data Processing Service Organizations* v. *Camp*, 397 U.S. 150 (1970), and finally to *Warth* v. *Seldin*, ____ U.S. ____, 43 L.W. 4906, it is apparent that respondents' standing cannot be supported by reference to any of the tests propounded by the Court. Moreover, respondents' standing becomes less tenable as one progresses through the most recent standing cases.

Respondents do not have the requisite "personal stake" in the constitutionality of the challenged statute. That "personal stake" belongs to the pregnant women denied medical reimbursement for non-therapeutic abortions. The statute in question does not subject respondents to criminal sanctions, nor does it decline to them the right to perform an abortion. Respondents claim only an uncertainty as to the future source of payment for abortions performed on prospective patients.

Likewise, there is no "logical nexus" between the status of respondent-physicians and the constitutional claims they raise. It is only pregnant women who are denied Medicaid assistance by operation of the challenged statute, and it is only pregnant women who can claim a connection between that denial and their right to privacy and to be afforded the equal protection of the law.

As an even more formidible barrier to the respondents' standing, whatever personal detriment they may incur by operation of the challenged statute is not within the "zone of interest" protected by the various constitutional provisions under which they claim the statute to be unconstitutional. The constitutional right to privacy, construed by this Court in *Roe* and *Doe* to include the right of a woman to terminate her pregnancy, does not extend to a doctor's interest in receiving Medicaid funds, nor does the Equal Protection Clause protect persons not themselves the subject of "invidious discrimination".

And, finally, respondents have not pointed to a specific concrete instance in which they have been deprived compensation for their services or have been unable to perform an abortion by reason of the challenged statute. The respondents' complaint is totally devoid of allegations of "demonstrable, particularized injury." Also, respondents have alleged no causal connection between the challenged statute and injury which the respondents may incur. It is the decision of the pregnant woman whether to have an abortion which determines a physician's ability to perform the operation or be compensated for it.

2. On appeal from an order by a statutory three-judge district court dismissing a complaint for lack of standing, the Court of Appeals had no jurisdiction to reach the merits of the respondents' claim that the challenged state statute

is unconstitutional. Title 28, U.S.C. Section 2281 requires that a three-judge court be convened, before a state statute may be found unconstitutional, where a complaint alleges the unconstitutionality of the statute, a state officer is named as a party, and injunctive relief is sought. All of those elements were present in Count II of respondents' Complaint. Therefore, only a three-judge district court has statutory authority to reach the merits of respondents' constitutional claims.

Despite the fact that Congress, pursuant to Article III of the Constitution, conferred only appellate jurisdiction on the Courts of Appeal, the Eighth Circuit exercised original jurisdiction to reach the constitutionality of the challenged statute although the required three-judge court had not reached that issue. The rule that any appellate court should not consider, for the first time on appeal, constitutional questions is patently applicable to the present case because this Court has never considered whether a state must give financial assistance to an eligible welfare recipient for an elective surgical procedure, i.e., non-therapeutic abortion.

Given a like opportunity to issue a decision of constitutional import on an almost identical state statute, the United States Court of Appeals for the Sixth Circuit, specifically stating its opposition to the result reached by the Eighth Circuit, correctly remanded constitutional claims concerning a welfare abortion statute for resolution by a three-judge district court. *Roe* v. *Ferguson,* 515 F.2d 279 (6th Cir. 1975).

The court below took unto itself original jurisdiction to determine the constitutionality of a state statute which issue had not been taken up, nor decided, by the three-judge district court from which the appeal was taken. To that extent, the Eighth Circuit perverted the statutory scheme which Congress has conferred jurisdiction on the several levels of federal courts.

ARGUMENT

I

The respondent-physicians are not proper parties to request an adjudication relating to the constitutionality of Section 208.152(12), RSMo Supp. 1973, because they do not have sufficient personal stake in the constitutionality of that state statutory section to assure the degree of concrete adverseness necessary before a federal court may exercise its Article III powers, nor are the interests of the respondent-physicians in the constitutionality of the state statutory section within the zone of interests protected by the constitutional guarantees on which the respondent-physicians rely.

Section 208.152(12), RSMo Supp. 1973, insofar as here pertinent, excludes abortions not medically indicated from the range of family planning services for which the State of Missouri will make benefit payments for medical assistance on behalf of eligible needy persons. In their complaint filed in the United States District Court for the Eastern District of Missouri on November 2, 1973, the respondent-physicians alleged that this Missouri statutory section "is in violation of the constitutional rights of plaintiffs and their patients, as protected and guaranteed by the First, Fourth, Fifth, Eighth, Ninth and Fourteenth Amendments to the United States Constitution." (App. pp. 16-17). This court has granted certiorari to determine whether the respondent-physicians have the requisite standing to assert the unconstitutionality of the state statute in the federal courts. As a result, we are not concerned whether the issue presented by the respondent-physicians, as an abstract matter, is itself justiciable, but rather whether the physicians who have filed this particular suit are proper parties to request an adjudication concerning the constitutionality of Section 208.152(12), RSMo Supp. 1973. *Flast* v. *Cohen,* 392 U. S. 83, 99 (1968). It is respectfully submitted that the

opinion of the three-judge district court, later reversed by the Court of Appeals, was correct in holding that the respondent-physicians lacked the requisite standing to allege the unconstitutionality of the state statute herein questioned.

> "Keeping in mind that it is the welfare recipient in whose behalf medical assistance payments under R. S. Mo. 208.152 are made and that it is the welfare recipients and not their physicians who have a right to a hearing if their medical assistance claims are denied, and that the plaintiff-physicians are not prohibited from performing abortions, this Court finds that the standing requirement of *Flast* v. *Cohen*, 392 U.S. 83, 102, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968), that there be a logical nexus between the status asserted by the plaintiffs and the claim they seek to have adjudicated is not satisfied by the litigative posture of the plaintiff-physicians herein, and, therefore, they lack standing to challenge the constitutionality of the statute in question here."

(App. p. 52; 380 F.Supp. 1137, 1144 (E.D.Mo. 1974).)

In their complaint, respondents claim status as licensed physicians (App. pp. 10, 11), the members of a class

> "... consisting of duly licensed physicians and surgeons presently performing or desiring to perform abortions upon women, minors and adults, eligible for Missouri State Medicaid assistance and payments except as restricted or prohibited by the statutory wording, herein challenged." (App. p. 15).

In fact, Section 208.152(12) includes no restriction on the performance of abortions by licensed physicians and surgeons. It is clear that the only interest that respondents have in the constitutionality of this state statutory section is a desire that public funds be used to reimburse them

for abortion operations they may perform in the future on women otherwise eligible for state Medicaid assistance. The respondent-physicians are seeking to expand the range of circumstances which will, in the future, enable them to feed at the public trough.

Standing, as a legal concept, is not an easy subject of standardization. A case by case analysis of individual complainants and the facts which they allege create a cause of action is a necessary prerequisite to standing determinations. Nevertheless, this court has made numerous attempts in recent years to establish guidelines or tests whereby the existence of standing in a particular case can be analyzed. These tests have become increasingly exclusive. For example, in *Baker* v. *Carr*, 369 U.S. 186 (1962), Tennessee voters were found to have standing to allege the unconstitutionality of state apportionment which resulted in inequality of representation. The Court defined the test for determining the existence of standing as follows:

> "A federal court cannot 'pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies.' (citation omitted) Have the appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions?"

Baker v. *Carr*, *supra* at 204.

In *Baker* v. *Carr*, the plaintiff-voters had the requisite personal stake in the constitutionality of a state statute providing for the representation of voters because that statute provided representation to the plaintiffs which was more diluted than the representation it provided to

voters in less populous districts. There is no analogy which can be taken from *Baker* v. *Carr, supra,* which would assist the respondents in the present case in establishing their standing to allege the unconstitutionality of the Missouri welfare abortion statute. As will be developed later, Section 208.152(12), RSMo Supp. 1973 provides Medicaid for eligible needy persons and is not designed or developed with any intention whatsoever to benefit individuals licensed to practice medicine in the State of Missouri. The plaintiffs in *Carr* had a personal stake in the constitutionality of a statute designed to provide them representation but which did so in a discriminatory matter. The respondents in this lawsuit have no personal stake in a statute designed to provide Medicaid assistance on behalf of eligible needy persons, except where such medical assistance would include non-therapeutic abortions. In addition, respondents are subjected to criminal prosecution by reason of the challenged statute. If they were they might qualify under the *Baker* v. *Carr* test. *Doe* v. *Bolton,* 410 U.S. 179, 188 (1973).

The Court also attempted to give substance to the abstract concept of standing in *Flast* v. *Cohen,* 392 U.S. 83 (1968). Although *Flast* is a taxpayer's standing case and should be considered in that framework as not totally analogous to any standing issue not involving taxpayers, the district court relied on the test enunciated in *Flast* v. *Cohen* to dismiss respondent's complaint against petitioner and the Court of Appeals relied partially on *Flast* in overruling the three-judge district court. The test for standing enunciated in *Flast* v. *Cohen, supra,* which has since been much quoted, requires the court

> "to look to the substantive issues for another purpose, namely, to determine whether there is a logical nexus between the status asserted and the claim sought to be adjudicated."

Flast v. *Cohen, supra* at 102.

As stated *supra,* the respondents allege status as licensed physicians (App. pp 10, 11)

> "presently performing or desiring to perform abortions upon women, minor and adult, eligible for Missouri State Medicaid assistance and payments." (App. p. 15).

The clam which the respondents seek to have adjudicated is that the Missouri state statute excluding abortions, not medically indicated, from the range of family services for which the state will pay Medicaid assistance is unconstitutional on several distinct grounds. (App. pp. 12-13).

The respondents first assert that the challenged state statute is unconstitutionally vague and uncertain (paragraph 9(a) of Complaint.) This allegation is meaningless absent the assertion of a logical connection or nexus.

The respondents then allege that the challenged state statute unconstitutionally denys them and their patients of the right to privacy. (Par. 9(b)). However, the constitutionally guaranteed right to privacy has no logical nexus to a licensed physician who may in the future want to be the ultimate recipient of public funds paid to an eligible welfare recipient choosing to terminate her pregnancy. The constitutional right to privacy guarantees only that the *pregnant woman* may choose to terminate her pregnancy within the first tri-mester following conception. We quote from *Roe* v. *Wade,* 410 U.S. 113, 152-153 (1973):

> "The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, going back perhaps as far as Union Pacific R. Co. v. Botsford, 141 U.S. 250, 251, 35 L.Ed. 734, 11 S.Ct. 1000 (1891),

the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. In varying contexts, the Court or individual Justices have, indeed, found at least the roots of that right in the First Amendment (citation omitted); in the Foutrh and Fifth Amendments (citations omitted); or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment (citation omitted). These decisions make it clear that only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty,' Palko v. Connecticut, 302 U.S. 319, 325, 82 L.Ed. 288, 58 S.Ct. 149 (1937), are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities relating to marriage (citation omitted); procreation (citation omitted); contraception (citations omitted); family relationships (citation omitted); and child rearing and education (citations omitted).

> This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."

The court went on to point out several types of personal detriments which could accrue to the pregnant woman should she not be allowed to decide in favor of an abortion. The standing which the court determined the physicians to have in the companion case to *Roe* v. *Wade, supra,* was not based on the right to privacy, but rather on the personal detriment a physician could incur by prosecution under a criminal abortion statute. *Doe* v. *Bolton,* 410 U.S. 179, 188 (1973).

The respondents also allege that the challenged state statute constitutionally deprives them of their right to practice medicine according to the highest standards of medical practice. (Par. 9(c) Complaint). In the first place, the petitioner respectfully submits that there is no recognized constitutional right to practice medicine according to certain standards of medical practice. Under *Flast,* it is certainly required that a challenged statute must be in regard to conduct specifically prohibited by a constitutional prohibition before standing can accrue. Secondly, it is ridiculous to assert that the lack of public reimbursement to eligible needy persons for non-therapeutic abortions could have any effect on the standard of medical practice exercised by the respondents. Do respondents suggest that surgical operations not reimbursable from public funds will be performed with has professional acumen?

The respondents' complaint additionally alleges that the challenged state statute denies to respondents' patients the constitutional right to determine whether to bear children. (Par. 9(d) Complaint.) As will be thoroughly discussed *infra,* the respondents have no standing to allege the constitutional rights of third persons.

Respondents' complaint next alleges that the challenged state statute infringes upon their constitutional right to render and their patient's right to receive safe and adequate medical advice and treatment pertaining to the decision whether to carry a pregnancy to term (Par. 9(e) Complaint). It is clear upon the face of respondents' complaint, however, that the challenged statute has nothing whatsoever to do with the respondent-physician's right to render advice and treatment concerning whether to perform an abortion. Taking the Complaint as a whole, including the challenged statute which is included therein, it is clear that the statute does not interfere with the respondent's right

to perform an abortion but only may create some uncertainty as to the source of payment for that abortion once it has been performed.

The respondents' complaint also alleges that they and their patients are being denied the equal protection of the laws (Par. 9(f) Complaint). Indeed, the court below, when it reached the merits, based its decision finding the challenged statute unconstitutional primarily on equal protection grounds. (App. p. 72) However, it is the pregnant woman choosing a non-therapeutic abortion who, according to the court below, is being treated differently than the pregnant woman choosing to bring her pregnancy to term or qualifying for a therapeutic abortion. The respondents do not allege that they, or any other doctor, is in any way subjected to invidious discrimination which is the result of a statute which excludes non-therapeutic abortions from the range of family services for which the State of Missouri will extend Medicaid assistance.

Paragraph 9(g) of the respondents' Complaint suffers from the very problems of vagueness and uncertainty alleged by respondents to afflict the challenged state statute. As is true with all of the specifications which respondents' complain alleges create a cause of action, this particular subparagraph is merely a conclusionary statement of the law totally devoid of specific references to the challenged statute or explanation of how that statute results in the alleged constitutional infirmities. Taking cognizance of the concept that factual allegations in the complaint should be taken as true for purposes of a motion to dismiss, nevertheless the challenged state statute here in question, under no stretch of the imagination, could expose the respondents to "the threat of great civil liability and loss of property, liberty and occupation. . . ." Apparently, the respondents are trying to manufacture a direct detriment sufficient

to secure their standing under *Doe* v. *Bolton,* 410 U.S. 179 (1973), which held that physicians who were the potential subjects of criminal prosecution had standing to prosecute criminal abortion statutes. In this case, however, the respondents' complaint attacks a statute concerned only with the exclusion of state medical assistance for a particular type of surgical procedure. It does not provide sanctions against anyone, including respondents.

In the last of the alleged constitutional deprivations included in their complaint, the respondents have come closest to alleging the existence of a constitutional claim having a logical nexus to their status as licensed physicians (Par. 9(h) Complaint). Respondents allege that the challenged state statute infringes upon the right of a physician, during the first tri-mester following conception, to make the abortion decision on behalf of a pregnant patient contrary to the due process clause of the Fourteenth Amendment. However, the respondents are still attempting to allege a right belonging to their prospective patients rather than to themselves. It is the pregnant woman which *Roe* v. *Wade, supra,* and *Doe* v. *Bolton, supra,* gave the constitutional right to choose an abortion, under limited circumstances, as an incident to the woman's right to privacy. The physician has no constitutional right to make an abortion decision on behalf of a pregnant patient.

There is no logical nexus between the status of the respondents in this case and the various claims which they seek to have adjudicated. *Flast* v. *Cohen, supra.* Likewise, the respondents do not have such a personal stake in the constitutionality of challenged state statute as to guarantee the concrete adversement spoken of in *Baker* v. *Carr,* 369 U.S. 186 (1962). The respondents are actually attempting to represent the interests of prospective patients, otherwise eligible for Medicaid assistance, who may in the future desire a non-therapeutic abortion in the State of Missouri.

Even more fatal to the existence of standing in this lawsuit is the test adopted by this Court in the companion cases of *Association of Data Processing Service Organizations Inc.* v. *Camp,* 397 U.S. 150 (1970); and *Barlow* v. *Collins,* 397 U.S. 159 (1970). The court states this new test as follows:

> "The question of standing is different. It concerns, apart from the 'case' or 'controversy' test, the question whether the interest sought to be protected by the complainant is arguably within the zone of interest to be protected or regulated by the statute or constitutional guarantee in question." *Association of Data Processing Service Organizations Inc.* v. *Camp, supra* at 153.

As more clearly enunciated in *Barlow* v. *Collins, supra,* these two cases have actually given us a double-barreled test as a tool in standing matters. First, the complainants must have the personal stake and interest to provide the concrete adverseness required by Article III. This is essentially the test in *Baker* v. *Carr, supra,* and very little removed, exception by language, from the test employed in *Flast* v. *Cohen, supra.* Secondly, the complainant must be clearly within the zone of interests protected by the statute or constitutional guarantee relied upon in alleging a cause of action. *Barlow* v. *Collins, supra* at 164. The test propounded by the court in *Baker* v. *Carr, supra,* and *Flast* v. *Cohen, supra,* have been discussed. But the "zone of interest" test, which *Association of Data Processing Service Organizations Inc.* v. *Camp, supra,* and *Barlow* v. *Collins, supra,* add to the litany of legal precedent concerning standing, creates an even more affective barrier to the respondents in this case. It is doubtful that the respondents have sufficient standing to maintain this lawsuit under the test in *Flast.* It is certain that the respondents lack the

standing to maintain this lawsuit under the test announced in the *Data Processing* case. In his dissenting opinion to *Data Processing* and *Barlow,* Mr. Justice Brennan asserts that the "zone of interests" test has created yet a second condition to the existence of standing in the federal courts. *Id.* at 168. We agree.

Without again waltzing through the various allegations of unconstitutionality included in the respondents' complaint, the constitutional guarantees on which respondents rely can be reduced to three general allegations: That the challenged state statute interferes with the right to privacy guaranteed through the United States Constitution; that the challenged state statute is in violation of the equal protection clause of the Fourteenth Amendment; and that the challenged state statute deprives the respondents of a constitutional right to practice medicine.

The court recognized in *Roe* v. *Wade, supra,* and *Doe* v. *Bolton, supra,* that a pregnant woman has a limited right to choose an abortion pursuant to the constitutional right to privacy. These cases protect the woman's right to privacy and in no way extend the constitutional right to privacy to a physician who, in the future, may desire to perform abortions on women otherwise eligible for state Medicaid assistance except for the prohibition of Section 208.152(12), RSMo Supp. 1973. The interests of respondents are not within the zone protected by the constitutional right to privacy.

The court below, in reaching the merits, declared that:

> "We find it unnecessary to review again *Roe* and *Doe* or what this court has said in applying those cases. Suffice it to say that the statute here provides medical payments if the pregnancy is carried to term or for therapeutic abortions but not if a non-therapeutic abortion is performed. This classification is a clear

violation of the Equal Protection Clause of the Fourteenth Amendment." (App. p. 72).

Under the theory of the court below, it is clear that it is the pregnant prosective welfare recipient who is the subject of discrimination. The statute in question in no way discriminates against physicians. Any qualified physician may perform an abortion within the limitations set forth in *Roe* and *Doe*. The equal protecton clause protects only those who are actually discriminated against.

The court below largely predicated its fnding that the respondents in this matter did have standing on two of its own cases, *Nyberg* v. *City of Virginia,* 495 F.2d 1342 (8th Cir. 1974), *cert. den.* 419 U.S. 891, 42 L.Ed.2d 136, 95 S.Ct. 169 (1975), and *Word* v. *Poelker,* 495 F.2d 1349 (8th Cir. 1974). These cases relate to the alleged constitutional right to practice medicne. In both cases, the Eighth Circuit found that *Roe* and *Doe* justified the deduction that physicians had a constitutional right to practice medicine including the right to advise and perform abortons. In *Nyberg,* the Eighth Circuit found unconstitutional a municipal hospital resolution prohibiting the use of hospital facilities for non-therapeutic abortions. In *Word,* the Eighth Circuit found unconstitutional a city ordinance regulating and licensing abortion clinics. *Word* did not specifically deal with standing. However, in *Nyberg,* the court below found that physicians had standing to assert the unconstitutionalty of a resolution which denied to them the use of hospital facilities to perform abortions, thereby interfering with their right to practice medicine. The court below found that this conclusion was dictated by *Roe* and *Doe*. In fact, those cases involved the standing of a doctor who is potentially subject to criminal prosecution for violation of a criminal abortion statute. It requires a much further step, which the Eighth Circuit took in *Nyberg* to find that

a physician has standing to force a hospital to allow him to perform abortions with hospital facilities. It is even more illogical to take the further step, which respondents ask that we do in this case, to find that a physician has standing to force a state to pay Medicaid assistance to indigent pregnant mothers for the purpose of abortion. *Roe* and *Doe* should not and cannot be distorted to that extent. Assuming, *arguendo,* that the Eighth Circuit was correct in its decision in *Nyberg,* it does not follow that the respondents in this case have standing to allege the unconstitutionality of the challenged state statute. The statute in question does not restrict respondents, as did the resolution in *Nyberg,* from performing abortions. The statute in question does not deny the respondents the opportunity to receive compensation for abortion services they may perform in the future. The challenged statute only provides that the State of Missouri will not reimburse welfare recipients for abortion services performed.

Licensed physicians desiring that prospective patients be eligible to receive Medicaid assistance for non-therapeutic abortions cannot be considered to be within the zone of interest protected by any of the constitutional guarantees which could be relied upon to declare Section 208.152(12), RSMo Supp. 1973, unconstitutional. To hold otherwise would expand standing, and the "zone of interests" test, to a ridiculous extreme and overburden this court with controversies laden with improper parties. If these respondent-physicians have standing, then it logically follows that the landlord of pregnant woman, eligible for Medicaid assistance, could challenge this state statute on the ground that if the woman has to pay a doctor for an abortion with her own funds, rather than with public funds provided by the state, she will not be able to pay her rent to the landlord. The standing test promulgated by this court in *Association of Data Processing Service Organizations Inc.* v.

Camp, supra, and *Barlow* v. *Collins, supra,* preclude the respondents in this case from having standing to assert the unconstitutionality of the challenged state statute.

That the respondent-physicians herein are not proper parties to assert the constitutional matters included in their Complaint is also made clear by the substance of the challenged statute and of the overall Medicaid framework of which it is a part. As emphasized by District Court (App. p. 47), Section 208.152(12), RSMo Supp. 1973, provides for the payment of medical assistance benefits "on behalf of those eligible needy persons who are unable to provide for in whole or in part. . . ." Not only are payments made on behalf of eligible persons, but only the welfare recipient is granted a right to a hearing when a claim for medical reimbursement is denied. A doctor is not granted a right of appeal. See Title 45, Code of Federal Regulations, Public Welfare, Chapter II, Section 205.10 (Revised as of October 1, 1973), and Section 208.156, RSMo 1969. Therefore, eligible needy persons are the intended beneficiaries of the statutory scheme of which Section 208.152 is a part; eligible needy persons are the people hurt by the operation of any restriction placed on the payment of medical assistance benefits because they are not provided the needed cost reimbursements; and welfare recipients are the ones given a statutory right to appeal adverse determinations. Obviously, it is the pregnant woman, otherwise eligible for Medicaid assistance, who is the proper party to challenge this state statute.

Likewise, the respondents cannot establish standing on the basis they are representing the rights of their patients. Not having standing in their own right to challenge Section 208.152, respondents may not bring this action on behalf of their patients to protect their patients' fundamental rights. *Tileston* v. *Ullman,* 318 U.S. 44, 46 (1943).

The general rule under *Tileston,* that only those persons having constitutional rights should be able to assert those rights in the federal courts, can be avoided only where the complaining parties have clear and obvious standing on their own behalf, as, for example, being subject to criminal prosecution, *Griswold* v. *Connecticut,* 381 U.S. 479, 481 (1965), and *Doe* v. *Bolton,* 410 U.S. 179, 188 (1973), or where the parties whose rights are to be represented cannot advance those rights on their own behalf as in *Barrows* v. *Jackson,* 346 U.S. 249, 257 (1953), and *N.A.A.C.P.* v. *Alabama,* 357 U.S. 449, 459 (1958). In the instant case, the respondents do not have standing in their own right, are not subject to prosecution by reason of the existence of Section 208.152, and therefore cannot acquire standing under the exception of *Griswold* v. *Connecticut, supra.* Also, the indigent women which Section 208.152 was intended to benefit are fully able to advance their own rights. For example, in *Klein* v. *Nassau County Medical Center,* 347 F.Supp. 496, 498 (E.D.N.Y. 1972), all plaintiffs were pregnant at the time they became plaintiffs; all plaintiffs had applied at different times for an abortion; all plantiffs asserted that they could not afford abortions; all plaintiffs up to the time they filed suit had been unable to obtain an abortion; and all plaintiffs alleged that they were indigent.

The principle that a party may vindicate only his own constitutional rights but may not seek vindication for the rights of third parties is still a viable principle of standing. *Moose Lodge No. 107* v. *Irvis,* 407 U.S. 163 (1972); and *Sierra Club* v. *Morton,* 405 U.S. 727 (1972).

The petitioner especially directs the attention of the court to its latest opinion on the subject of standing. *Warth* v. *Seldin,* No. 73-2024, decided on June 25, 1975, 43 L.W. 4906. The denial of standing to several groups of plaintiffs

and intervenors in that case, each asserting a distinct status, leads inextricably to the conclusion that the court is not predisposed toward relaxing traditional standing requirements. If anything, *Warth* indicates that the court will even more jealously, than has been the case in the past, guard its docket, and that of the lower federal courts, against lawsuits instituted by improper plaintiffs. In *Warth*, four kinds of plaintiffs tried to attack the constitutionality of the zoning ordinance of Penfield, a suburb of Rochester, New York. It was alleged that the purpose and effect of the zoning ordinance, and its enforcement, was to deny persons of low and moderate income from the right of living in Penfield. Injunction, declaratory relief, and damages were sought. This court found that none of the plaintiffs had standing.

One group of plaintiffs challenging the Penfield zoning ordinance consisted of a group of Rochester residents of low or moderate income belonging to minority racial or ethnic groups. These plaintiffs, in conclusory terms, alleged that they were excluded from living in Penfield due to the discriminatory ordinance which had the effect of precluding low or middle income housing from being built in that surburban area. The Court held that:

> "... [A] plaintiff who seeks to challenge exclusionary zoning practices must allege specific, concrete facts demonstrating that the challenged practices harm *him*, and that he personally would benefit in a tangible way from the courts' intervention."

Warth v. *Seldin*, 43 L.W. at 4911.

The plaintiffs in *Warth* failed to allege any particular proposed construction project which they would have qualified to live in. They did not allege a single instance in which the housing ordinance, or its enforcement, had the specfic result of denying them access to housing in Penfield.

In other words, the plaintiffs in that case failed to allege specific facts showing that, absent the existence of the Penfield zoning ordinance and its enforcement, they would have been able to find housing in Penfield. Rather, the plaintiffs in *Warth* claimed that

> "... respondents' enforcement of the ordinance against third parties—developers, builders, and the like—has had the consequence of precluding the construction of housing suitable to their needs at prices they might be able to afford." *Warth* v. *Seldin*, 43 L.W. at 4910.

This is very similar to the position of respondents in the present case. In effect, the respondents claim that the existence of a statute excluding non-therapeutic abortions from qualification for Medicaid reimbursement may have the result of precluding pregnant welfare recipients from choosing abortions with the further result that respondents will not be paid for surgery not performed. As in *Warth*, the respondents herein have not alleged the existence of a single woman for whom the respondents performed an abortion which was not paid for, the existence of a single woman who decided against abortion because of the existence of the Missouri statute, or any facts to indicate that, absent the Missouri statute, they would have performed more abortions or have made more money.

The court also held that taxpayers of Rochester lacked standing. The claim of this group of plaintiffs in *Warth* was that the existence of Penfield's discriminatory zoning ordinance required the city of Rochester to bear a larger proportion of the cost of providing housing and services to persons of low and moderate income than would otherwise have been the case. The court first expressed a doubt that this group of plaintiffs can even establish the existence of personal detriment much less the second spoke of the test of the *Data Processing* case that a specific con-

stitutional guarantee include their interest. The court pointed out that the injury complained of, increases in taxation, did not result from the existence of the Penfield zoning ordinance but was the result of taxing decisions made by Rochester officials. This Court clearly inferred that a causal connection is a necessary pre-condition to standing. By analogy, the respondents in the present case cannot be said to be directly injured by the existence of the Missouri welfare abortion statute but rather by conjectured future decisions by pregnant women. The court went on to hold that even if the plaintiffs in *Warth* met the injury in fact requirement, they could not qualify under the "zone of interests" test, because they asserted only the constitutional rights of low and moderate income persons not to be excluded from Penfield. Just so, the respondents in the present case are really asserting the rights of pregnant women to receive Medicaid assistance. The court found that there was no good reason to waive this second requirement in order to let the plaintiffs assert the constitutional rights of third persons because: Rochester taxpayers were not subject to Penfield's zoning ordinance (The respondents in this case are not subject to the Missouri statute providing Medicaid assistance on behalf of eligible needy persons.); and the third persons whose rights are at stake can assert their own rights in the proper case.

In amplification of the causal relationship discussed by the Court in *Warth,* 43 L.W. at 4911, if it is respondents' contention that they cannot treat X number of patients because of lack of public funds, any injury to their personal right to practice medicine is the result of their independent decision not to accept indigent patients who cannot afford their fees. If, on the other hand, they contend they will treat all indigent patients applying for abortion, how can the challenged statute interfere with their right to practice medicine in the grand manner?

Another plaintiff in *Warth,* a not-for-profit corporation whose purposes included the support of low and moderate income housing, claimed on behalf of a percentage of its membership, residing in Penfield, that the zoning ordinance of that community subjected them to a non-integrated "white ghetto" atmosphere. Again, the court found no standing:

> "Even if we assume *arguendo* that apart from any statutorily created right the asserted harm to Metro-Act's Penfield members is sufficiently direct and personal to satisfy the case or controversy requirement of Art. III, prudential considerations strongly counsel against according them to Metro-Act standing to prosecute this action. We do not understand Metro-Act to argue that Penfield residents themselves have been denied any constitutional rights, affording them a cause of action under 42 U.S.C. Section 1983. Instead, their complaint is that they have been harmed indirectly by the exclusion of others." *Warth* v. *Seldin,* 43 L.W. at 4913.

Likewise, the respondent-physicians in the present case are really asserting the constitutional rights of indigent pregnant women. Even if we assume that the respondents, in the absence of the challenged statute, might in the future receive public funds originally paid to a welfare recipient for an abortion operation, the only constitutional right which the respondents are asserting is the right of the woman to choose the abortion alternative to her pregnancy.

The remaining plaintiffs in *Warth* consisted of associations of developers, contractors, and other groups involved in the development of low and moderate cost housing. These plaintiffs alleged that various of their members were incurring economic detriment because Penfield's zoning restrictions had deprived them of business opportuni-

ties and profits. The court noted that the complaint of these plantiffs failed to specifically allege the existence of any specific project which a member contractor had been precluded from entering into, by reason of the zoning restrictions, nor any single instance when one of plaintiff's members had applied for or been denied a building permit or variance to build moderate or low cost housing. *Warth* v. *Seldin,* 43 L.W. at 4914. The respondents' complaint in this case suffers from the same fatal deficiency. The respondents have failed to allege a single specific instance where the operation of Section 208.152(12), has resulted in a detrimental effect to respondents, and, like the developer in *Warth,* only allege generalized loss of business profits due to the challenged statute.

In *Warth* v. *Seldin, supra,* the court emphasized the importance of standing in the following manner:

> "The rules of standing, whether as aspects of Art. III case or controversy requirement or as reflections of prudential considerations defining and limiting the role of the courts, are threshold determinants of the propriety of judicial intervention. It is the responsibility of the complainant clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers." *Warth* v. *Seldin,* 43 L.W. at 4914.

The Court has clearly indicated that suits should not be entertained by the federal courts unless the complainants are the appropriate parties to seek the relief requested. The docket of the Court cannot tolerate a succession of lawsuits brought, even if with the best of intentions, by persons attempting to assert the constitutional rights of third persons. It is clear in the present case that what the respondents are really seeking is legal recognition of

the fact that indigent pregnant women in Missouri should be eligible to receive Medicaid assistance for non-therapeutic abortions. These women are the proper parties, not the respondent-physicians. The respondents' interest is that they may be the ultimate recipient of public funds paid out in support of optional surgical processes. If the respondents can assert the unconstitutionality of a statute excluding optional abortion, it must follow that they have standing to assert that the State of Missouri must make Medicaid payments for other optional surgical processes such as plastic surgery or silicone transplants. This is patently not the case. Those who are eligible for Medicaid assistance are the proper individuals to assert that the state must make payment for a particular medical process. Doctors should not be allowed in court, in lieu of such eligible welfare recipients, to urge the expansion of Medicaid programs toward the economic betterment of the medical profession.

II

In reaching the merits of respondents' claim that the challenged state statute is unconstitutional, for the first time on appeal, the court below acted in excess of the authority conferred upon it by Congress by exercising original jurisdiction to reach an issue which is the proper subject for determination by a three-judge district court.

By way of introduction into its discussion of why the merits of respondents' claim should be reached, the United States Court of Appeals for the Eighth Circuit correctly noted the dangers of an appellate court deciding a claim not considered in the district court.

> "We are urged by appellants to reach the merits of this case rather than remand to the three-judge court. This question is not without its difficulty. There

is little direct authority for the propriety of our reaching the merits.'' (App. p. 70).

Nevertheless, the court below proceeded to decide, on the merits, the constitutionality of Section 208.152(12), RSMo Supp. 1973, for the first time on appeal. The Eighth Circuit acted in excess of its jurisdiction when it did so. The extent of the lower court's jurisdiction was to remand the matter to a three-judge district court for determination, on the merits, of the respondents' claim that the challenged state statute was unconstitutional.

When a three-judge panel of the United States District Court for the Eastern District of Missouri dismissed Count II of the respondents' complaint on the ground that physicians lacked standing to assert the unconstitutionality of Section 208.152(12), RSMo Supp. 1973, respondents appealed that order of dismissal to the United States Court of Appeals for the Eighth Circuit. On the record before the Court of Appeals, it was clear that the petitioner had never filed an answer to the respondents' complaint; that the record before the District Court in regard to the constitutionality of the challenged state statute consisted solely of conclusory statements included in respondents' complaint; that the District Court had never conducted a hearing or other inquiry into the constitutionality of the state statute on its face or as applied; that the District Court had made no ruling whatsoever involving the constitutionality of the state statute in question; that the petitioner had never had an opportunity to brief or argue the constitutional merits of Section 208.152; and that the respondents' complaint included every allegation necessarily prerequisite to the impaneling of a statutory three-judge district court. Regardless, the Court of Appeals, once it found that the respondents had sufficient standing, proceeded to determine that the challenged statute was unconstitutional relying

solely on the allegations in the respondents' Complaint and on the legal arguments included in the respondents' brief before the Eighth Circuit, which legal arguments were unresponsive to and irrelevant to the sole question on appeal, i.e., had the District Court erred in dismissing Count II of the complaint on the basis of standing.

As the court below properly noted, it had jurisdiction to entertain an appeal from a three-judge district court order dismissing a complaint for lack of standing pursuant to the decision of this Court in *Gonzalez* v. *Automatic Employees Credit Union*, ___ U.S. ___, 42 L.Ed.2d 249 (1974). (App. p. 67). During the period of time in which the respondents filed their notice of appeal to the Eighth Circuit and their appellate brief with that court, the proper appellate jurisdiction over a three-judge court order dismissing a complaint for lack of standing was with the Supreme Court. *Lynch* v. *Household Finance Corporation*, 405 U.S. 538, 541-542 n. 5 (1972); and *Flast* v. *Cohen*, 392 U.S. 83, 89-91 (1968). In fact, neither the Court of Appeals nor the attorneys for the various parties were aware of the existence of the *Gonzalez* case, or the charge it had made in appellate jurisdiction over three-judge district court orders not reaching the merits, at the time this matter was argued below. Neither the Eighth Circuit nor the respondent should be entitled to rely on the provident decision in *Gonzalez*, that the Court of Appeals had appellate jurisdiction to consider appeals from orders of three-judge district courts dismissing complaints for lack of standing, without, on the other hand, being bound by the clear enunciation, included in *Gonzalez*, concerning the parameters of the appellate jurisdiction of a Court of Appeals. In *Gonzalez*, this court reasoned that a three-judge court is not required in a case where the complaint is not justiciable in the federal courts. In other words, a single district judge has authority to dismiss a case for lack of standing and,

even if the dismissal on standing grounds is made by a three-judge court, such a court could have dissolved itself and left the order of dismissal up to a single judge. In such a case, proper appellate jurisdiction resides with the Circuit Courts of Appeal because no decision was rendered requiring a three-judge district court. *Gonzalez* v. *Automatic Employees Credit Union*, ____ U.S. ____, 42 L.Ed.2d 249, 258-159 (1974). Therefore, the only appellate jurisdiction which the Eighth Circuit had in this case was to review an order of dismissal, on the basis of standing, which order could have been made by a single judge. A single judge does not have the authority to render the relief on the merits required by respondents' complaint. Since the jurisdiction of the court below was based solely on the fact that a single judge could have dismissed Count II, it logically follows that a Court of Appeals does not have jurisdiction to review a decision, on the merits, required to be made by a three-judge district court. In that the Eighth Circuit could not have reviewed an opinion of the three-judge court on the merits, it is elementary that it cannot enter the case on the peripheral issue of standing and then proceed to resolve a constitutional question, required to be heard but which was not considered, by a district court of three judges.

Article III of the United States Constitution grants unto Congress the power to establish and prescribe the jurisdiction of the various federal courts. Congress has conferred exclusive original jurisdiction upon three-judge district courts in those cases where a state statute or administrative order is challenged, a state officer is named as a party defendant, injunctive relief is sought, and it is claimed that the state statute or administrative order is contrary to the United States Constitution. Title 28, U.S.C. Section 2281. Note that Congress has provided that in such case relief based on the unconstitutionality of a

state statute shall not be granted "unless the application therefor is heard and determined by a district court of three judges . . .". In the instant case, the United States District Court for the Eastern District of Missouri, impaneled as a three-judge court, has taken no action toward a determination of the constitutionality of Section 208.152 (12), RSMo Supp. 1973. Congress has also been explicit in its provision concerning the jurisdiction of the several Courts of Appeal. Title 28, U.S.C. Section 1291 provides:

> "The courts of appeal shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

Direct review of the decisions, on the merits, of three-judge district courts may be had in the Supreme Court. Title 28, U.S.C. Section 1253.

The conclusions to be drawn from congressional enactments concerning the jurisdiction of the several levels of federal courts are obvious (1) Complaints making the necessary allegations to invoke the operation of Section 2281 require a determination by a district court of three judges. Since Count II of the respondents' original complaint in this matter includes sufficient allegations to come within the three-judge district court statute, the merits were absolutely required to be heard by a district court of three judges in the exercise of its exclusive original jurisdiction (2) The courts of appeal have only appellate and no original jurisdiction. The constitutionality of Section 208.152, RSMo Supp. 1973, was not appealed to the Eighth Circuit because the issue had never been determined by the District Court. The Court of Appeals acted in excess of its authority when

it reached the merits of this case because it did not have the requisite jurisdiction to make such a determination (3) Having before it, on appeal, only the question of whether the respondents had standing to instigate their alleged cause of action, the extent of the authority of the Eighth Circuit was to reverse the District Court on the matter of standing and remand the case for further proceedings consistent with the three-judge court statutes. (4) Only the Supreme Court has jurisdiction to review, on the merits, a claim which must in the first instance be resolved by a district court of three judges. If the three-judge district court had ruled on the merits, the court below could not review that decision—only the Supreme Court could. Certainly, the Eighth Circuit cannot review the merits when the district court has not even considered them.

It is improper for a Court of Appeals to consider constitutional questions for the first time on appeal whether or not the controversy, in the first instance, was one for resolution by a one-judge or a three-judge district court. It is well recognized that a Court of Appeals should not reach on appeal the merits of an issue in regard to which a District Court has not ruled. *Equal Opportunity Commission* v. *Standard Forage and Axel Co., Inc.*, 496 F.2d 1392 (5th Cir. 1974); *Eureka-Carlisle Co.* v. *Rottman*, 398 F.2d 1015, 1019 (10th Cir. 1968); and *Fitts* v. *U.S.*, 376 F.2d 516 (10th Cir. 1967). It is even more fundamental the constitutional question should not be considered for the first time on appeal. *Giordano* v. *United States*, 394 U.S. 310, 312-313 (1969); *Bandy* v. *U.S.*, 396 F.2d 929, 930, *cert. den.* 393 U.S. 1004 (1968); *Gardner* v. *Meyers*, 491 F.2d 1184, 1190 (8th Cir. 1974).

The court below intimated that it had original jurisdiction, once a case was properly before it, "to do what plainly ought to done." *Mercury Motor Express, Inc.* v. *Brinke*, 475 F.2d 1086, 1091 (5th Cir. 1973). The quote in the *Mercury Motor Express* case is borrowed out of context. In that case, a one-judge district court denied preliminary injunctive relief to the appellant. That denial was appealed to the Fifth Circuit. The District Court had also stayed further proceedings pending action by a federal administrative agency. Although the stay itself was not an appealable order, the Fifth Circuit found that on interlocutory appeal from an order denying preliminary injunctive relief it could inquire into the wisdom of the stay order. This is a much different matter than reaching the merits of a state statute's constitutionality on appeal from an order from a three-judge district court dismissing a case on the basis of standing. Also, in the *Mercury Motor Express* case, the district court had taken action to issue a stay order, but the issuance of the stay order, unlike the denial of preliminary injunctive relief, was not an appealable order. In the present case, the three-judge district court has taken no action whatsoever to reach the merits of the respondents' constitutional claim.

The Eighth Circuit also attempted to justify reaching the merits in this matter on the basis that the constitutional claim presented was so clear that further proceedings in the district court were unnecessary. In support of this proposition, that court cited *Board of Managers of Ark. Tr. Sch. for Boys* v. *George*, 377 F.2d 228 (8th Cir. 1967); *Levin* v. *Mississippi River Fuel Corp.*, 386 U.S. 162 (1967); and *Bailey* v. *Patterson*, 369 U.S. 31 (1962). A one-judge district court was involved in the first two of those cases. In *Board of Managers of Ark., Tr. Sch. for Boys* v. *George, supra*, the defendant Board responsible for Arkansas' training schools for juvenile boys filed an interlocutory appeal to the Eighth Circuit from an order overruling their motion to dismiss. The statutes establishing the state training schools in Arkansas provided for

separate facilities for white and black juveniles. The Eighth Circuit affirmed the denial of the motion to dismiss and remanded the case with directions that the state statutes were clearly unconstitutional because comprehensive and authoritative decisions of the Supreme Court prohibited segregation in state institutons. *Id.* at 231. In fact, *Brown* v. *Board of Education of Topeka,* 347 U.S. 483 (1954), concerning equal educational facilities and one of the most famous landmark cases in Supreme Court history, had been decided thirteen (13) years before the Arkansas case was heard. On the other hand, it is not a settled matter of constitutional law that a state must provide Medicaid assistance for non-therapeutic abortions. The Supreme Court has never considered that issue.

In *Levin* v. *Mississippi River Fuel Corporation, supra,* at 839-840, this Court determined that it could reach the incidental issue of whether "company action" was involved in a stock exchange plan thereby making state law applicable to shareholder voting on a voluntary railroad company consolidation. It was unclear whether the court of appeals had reached that issue. Nevertheless, the court of appeals had determined that state law did not apply, unlike the present case in which the district court has never considered the merits at all. Moreover, this Court, in *Levin* very clearly refrained from reaching the merits of the proposed stock exchange plan itself. The Court only considered those issues relevant to the applicability of state statute, as opposed to federal law, a matter which the court of appeals had considered reaching a contrary result to that reached by the Supreme Court.

Bailey v. *Patterson, supra,* cited by the Eighth Circuit from a footnote in *Gonzalez* v. *Automatic Employees Credit Union,* ____ U.S. ____, 42 L.Ed.2d 249 (1974), comes the closest of any case cited by the Court of Appeals to stand-

ing for the proposition that a wholly insubstantial constitutional claim may be considered on appeal from a dismissal on procedural grounds. A three-judge district court had abstained from further proceedings on a complaint alleging that a Mississippi state statute denied Negroes their constitutional right to non-segregated transportation service in interstate transportation. The Court held that any claim that a state statute, which on its face provided for segregation of transportation facilities in interstate commerce, was constitutional would be frivolous. The Court vacated the abstention order of the three-judge district court and remanded the matter for expeditious disposition in light of the court's position that any statute providing for unsegregated transportation service was unconstitutional. Again, and as will be discussed below, it is not clear from Supreme Court case law, there being no decisions of the Court on that topic, that a state statute excluding non-therapeutic abortions from eligibility from Medicaid is unconstitutional.

In each of the three cases discussed above, the reviewing court remanded the case for further proceedings in light of its pronouncements on a particular issue. In the present case, the Eighth Circuit reversed the district court outright, without remand, on an issue which the district court had never considered. The exception to the general rule that an appellate court should not consider constitutional questions for the first time on appeal, i.e., that the constitutional question concerned is wholly insubstantial, does not apply to the present case. There is no support whatsoever in the decisions of this court that a state cannot finance necessary medical procedures unless it also agrees to finance procedures which are purely optional. *Roe* v. *Wade,* 410 U.S. 113 (1973), and *Doe* v. *Bolton,* 410 U.S. 179 (1973) go no further than holding that voluntary abortion may not be made the subject of criminal

sanctions when timely performed. It is quite another thing to say that the state must give financial assistance for an abortion simply because an indigent chooses to have one. The Equal Protection Clause prohibits only invidious discrimination. As the recent decisions of this Court in Equal Protection matters attests, the clause does not enjoin differential treatment based on a reasonable classification in support of valid policy.[1] The opinion by the Court of

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[1] A state may provide that local schools are to be financed substantially by local property taxes in spite of the wide variation of the taxing resources of the several districts. *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1 (1973).

A state may permit in-term salary increases for judges of some courts which are denied to other judges. *Ohio Municipal Judges Association* v. *Davis*, 411 U.S. 144 (1973).

Windows may be afforded tax exemptions which are not available to widowers. *Kahn* v. *Shevlin*, 416 U.S. 351, 40 L.Ed.1d 189, 94 S.Ct. 1734 (1974).

A state may exclude disabilities due to normal pregnancy in a disability insurance program while covering other disabilities of comparable duration including disability through abnormal pregnancy conditions. *Geduldig* v. *Aiello*, 417 U.S. 484, 41 L.Ed.1d 256, 94 S.Ct. 2485 (1974).

A state may furnish textbooks or transportation to public school pupils without providing equivalent services for those who attend non-public schools, in spite of constitutional permission for such aid. *Bruska* v. *Missouri*, 332 F.Supp. 275 (E.D.Mo. 1971); aff'd 405 U.S. 1050 (1972).

The federal government is not required to provide veterans' benefits to conscientious objectors who elect alternate service. *Johnson* v. *Robison*, 415 U.S. 361, 39 L.Ed.2d 389, 94 S.Ct. 1160 (1974).

Appeals does not logically follow the decisions of this court in *Roe, supra,* and *Doe, supra.* It is a much different thing to say that a doctor cannot be legally prosecuted for performing an abortion requested by a pregnant woman than to say, as the Court of Appeals has done, that states must subsidize the abortion process with public funds.

Likewise, the decision by the Court of Appeals, in conjunction with the provisions of Title XIX of the Social Security Act, and the Rules and Regulations promulgated thereunder, constitutes an unconstitutional intrusion by the federal courts and Congress into the internal affairs of the State of Missouri, which intrusion should not be tolerated in a federal system of government with powers and rights reserved to the states by the Tenth Amendment to the United States Constitution. The effect, *in toto,* of the Court of Appeals' opinion in the statutes discussed above is to force the State of Missouri to publicly fund non-therapeutic abortions, against the public policy of the state as announced by its Legislature, because refusal to do so would forfet all federal Medicaid grants.[2]

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[2] Petitioner Singleton has been administering the Division of Family Services of the Missouri Deartment of Social Services, in accordance with Title XIX of the Social Security Act, the Rules and Regulations promulgated thereunder, and instructions passed on by federal administrators, on the premise that should the state plan fail to provide for prenatal services for eligible individuals choosing to carry a pregnancy to term, or if the state refuses to pay for such services contrary to a state plan, that the State of Missouri would cease to be eligible for federal Medicaid grants. Using the present fiscal year as a basis, this would cost the State of Missouri approximately sixty-six (66) million dollars a year. The decision of the Court of Appeals, that should the state reimburse normal pregnancy it is

In deciding whether to reach the merits of a constitutional claim that a state statute excluding non-therapeutic abortions from state Medicaid benefits was invalid, the United States Court of Appeals for the Sixth Circuit reached the opposite result of the court below. After determining that an Ohio statute, similar to the Missouri statute here in question, restricting the payment of Medicaid funds to those abortions necessary to preserve the mental or physical health of the pregnant woman, was not in conflict with the pertinent federal statutory provisions of the Social Security Act, the Sixth Circuit determined that it was without jurisdiction to reach the constitutionality of that Ohio statute absent a finding on the issue by a three-judge district court.

> "We are unable to agree that this case falls within the exception to the application of Section 2281 which has been carved out by the courts in situations in which the constitutional issue has been clearly settled or resolved. This exception to the three-judge court requirement was expressed in *Board of Supervisors of La. St. U. & A. & M. College* v. *Ludley*, 252 F.2d 372, 376 (5th Cir. 1958), *cert. denied*, 358 U.S. 819; 79 S.Ct. 31, 3 L.Ed.2d 61 (1958):
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> > There can be no real dispute where each separate element on which the state relies to support the constitutionality of a statute has been clearly put to rest by the Supreme Court contrary to the contention of the state. *Cf. Goosby* v. *Osser*, 405 U.S. 512, 518, (93 S.Ct. 854, 35 L.Ed.2d 36 (1973).
>
> Although there have been a number of lower court

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required to reimburse non-therapeutic abortions, places the state in a position where it must pay for non-therapeutic abortions or loose federal Medicaid funds.

> decisions holding state statutes similar to the Ohio law are unconstitutional, it cannot be said that the issue has been put to rest by the Supreme Court. In *Roe* v. *Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), and *Doe* v. *Bolton*, 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed.2d 201 (1973), the Supreme Court condemned state action infringing the right to have an abortion. In those cases the Supreme Court did not consider the question of payment of expenses for abortion whether non-therapeutic or otherwise. We find ourselves, therefore, in disagreement with the Eighth Circuit's ruling in *Wulff* v. *Singleton*, 508 F.2d 1211 (8th Cir. 1974), that the unconstitutionality of this type of statute is so 'obvious and patent' as to obviate the need for a three-judge court."

Roe v. *Ferguson*, 515 F.2d 279, 284 (6th Cir. 1975).

We are in complete agreement with the analysis of the Sixth Circuit. The court below, after it found that the respondents have standing, should have remanded the matter to the three-judge district court for further proceedings on the merits of respondents' constitutional claim.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court below finding that respondents had standing to adjudicate the unconstitutionality of Section 208.152(12), RSMo Supp. 1973, should be reversed. If this court should affirm the decision of the court below that respondents have standing, then this matter should be remanded with instructions that a three-judge district court proceed to the merits of respondents' constitutional claim.

Respectfully submitted,

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